

## **N.D.A.G. Letter to State Officials (March 26, 1986)**

### MEMORANDUM

TO: All State Officials

FROM: Nicholas J. Spaeth, Attorney General

SUBJECT: Liability of State Employees and Officials

DATE: March 26, 1986

There have been numerous questions raised recently concerning the current status of the law as to liability of public officials and employees and the possible need for insurance covering potential liability. The purpose of this memorandum is to advise you as to the current status of the law on the subject of public official liability.

The doctrine of sovereign immunity continues to be a viable doctrine within the state of North Dakota. Sovereign immunity states that the state cannot be sued in its own courts or in any other courts without its consent and permission. This doctrine extends to state agencies, bureaus, departments, boards, and commissions.

The sovereign immunity doctrine also extends to state officials and employees who are sued in their official capacity. However, where state officials act outside the scope of their lawful authority, the official's act become unofficial and of a personal nature. Thus, they are no longer the acts of the state and are no longer entitled to the protection offered by sovereign immunity.

Moreover, in 1983, the North Dakota Supreme Court held that actions taken by a state employee within the scope of his employment may nonetheless be the subject of a personal capacity lawsuit. The impact of this decision has placed state officials and employees at risk in terms of a lawsuit brought against them in their personal capacity for actions they have taken within the scope of their employment. It is this threat of a personal capacity lawsuit for actions taken within the scope of one's official employment which should be addressed by the acquisition of appropriate insurance protection.

A significant potential for liability for state officials and employees is 42 U.S.C. § 1983. This is a federal statute which provides liability for those persons who, under color of state law, deprive another person of rights or privileges provided by the U.S. Constitution or other federal laws. State officers may be sued in their personal capacity for actions taken under color of state law pursuant to 42 U.S.C. §1983.

The North Dakota Legislature has authorized state agencies to insure against liabilities for its own protection and for the protection of any state employee. N.D.C.C. § 32-12.1-15(1). Thus, state agencies are able to insure against the risks imposed by lawsuits brought against state employees in their personal capacities for actions taken within the scope of their employment.

However, the agency must be extremely careful as to the purchase of liability insurance as provided for by N.D.C.C. § 32-12.1-15. Should the agency purchase insurance for its own protection in addition to the protection of its state employees, the agency has acted to waive sovereign immunity protection against lawsuits brought against itself and the state to the extent of the insurance coverage purchased. Thus, it is the suggestion of this office that agencies attempt to restrict insurance coverage solely for the protection of its state employees who may be sued in a personal capacity. You probably should have this office and the Insurance Department review insurance coverage you are interested in purchasing before you make a commitment.

Finally, we should mention the existence of qualified immunity. This form of immunity is available for state officials from personal liability for damages resulting from their acts in the performance of discretionary governmental functions. This form of immunity is not absolute and depends upon the facts and circumstances of each case.

Should you have further questions concerning this subject or the need for further legal counsel, please do not hesitate to contact me or the assistant attorney general assigned to your department.

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